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No. 339

In the Supreme Court of the United States

October Term, 1957.

JAMES J. MAHONEY, *Petitioner*,

v.

J. M. McKIBBEN, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is reported at 244 F. 2d 21.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1957. The petition for a writ of certiorari was filed on August 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the merits of a removal action, effectuated in full compliance with applicable statutory procedures, are subject to judicial review.

2. Whether the removal of petitioner from his position as postmaster could be accomplished by the Post Office Department through normal civil service procedures and without the personal action of the President.

3. Whether the Administrative Procedure Act conferred jurisdiction to review the substantive merits of a federal employee's dismissal which was valid under applicable procedures.

STATUTES INVOLVED

Act of June 25, 1938, Sec. 1 (52 Stat. 1076, 39 U.S.C. 31a):

> Postmasters of the first, second, and third classes shall hereafter be appointed in the classified service without term by the President by and with the advice and consent of the Senate * * *

Veterans' Preference Act of 1944, Sec. 14 (58 Stat. 390, 5 U.S.C. 863):

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, * * * shall be discharged * * * except for such cause as will promote the efficiency of the service * * *

Administrative Procedure Act, Sec. 10 (60 Stat. 243, 5 U.S.C. 1009):

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * *

STATEMENT

This is a suit challenging petitioner's dismissal from the federal civil service for failure to attend to duty.

On January 14, 1955, petitioner, a first class postmaster in charge of the Post Office at Pleasantville, New York, was served with a notice that the Post Office proposed to separate him for devoting substantial periods of time to his private affairs during business hours (J.A. 4-6).[1] Petitioner made a written reply to the charges against him (J.A. 84-87) but, on April 22, 1955, was notified by the Assistant Postmaster General that the charges were sustained and that he would be removed (J.A. 3-4). He was also advised that, as a veterans' preference eligible, he was entitled to appeal his dismissa to the Civil Service Commission (J.A. 4).

Petitioner appealed to the Second Regional Office of the Civil Service Commission, which conducted a full hearing as required by the Veterans' Preference Act (J.A. 91-100). The Regional Office determined that the Post Office Department's charges were not sustained by the evidence and ordered petitioner's reinstatement (J. A. 99). The Post Office Department appealed to the Board of Appeals and Review of the

[1] In this brief, J.A. designates the Joint Appendix filed by the parties in the Court of Appeals.

Civil Service Commission which reversed the Regional Office stating: "The evidence establishes that Mr. Moroney spent considerable time in the office of his private business on the dates cited in these charges, and it is only reasonable to believe that he was not engaged in postal business during that time."[2]

On June 1, 1956, petitioner filed this suit for declaratory judgment and injunctive relief in the United States District Court for the District of Columbia challenging the legality of his dismissal (J.A. 1-3). An attempt in this suit to enjoin his impending dismissal was unsuccessful (J.A. 13-15), and he was discharged from his position on August 2, 1956.

On July 25, 1956, the District Court granted without opinion respondents' motion for summary judgment (J.A. 16). Upon appeal to the Court of Appeals for the District of Columbia Circuit, this judgment was affirmed, *per curiam*, upon the authority of *Saggau* v. *Young*, 240 F. 2d 865; *Hargett* v. *Summerfield*, 243 F. 2d 29, certiorari denied, 353 U.S. 970; and *Williams* v. *Cravens*, 210 F. 2d 874, certiorari denied, 348 U.S. 819 (Pet. App. 1a).

ARGUMENT

Petitioner, a veterans' preference eligible, was dismissed from his position as a postmaster in the classified civil service upon charges of failing to attend to his duties during office hours. The Post Office decision to discharge him was reviewed by the Civil Service Commission which, after a full hearing on the charges, sustained the order of dismissal.

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[2] The decision by the Board of Appeals and Review of the Civil Service Commission, which is part of the record below but was inadvertently omitted from the Joint Appendix, is set forth in full in the appendix to the appellees' brief in the Court of Appeals.

In addition to this review, the procedural validity of his discharge has been examined and sustained by the District Court and the Court of Appeals for the District of Columbia Circuit. He now seeks further review by this Court on grounds substantially the same as those in *Hargett* v. *Summerfield*, 243 F. 2d 29, in which this Court denied certiorari, 353 U.S. 970. We submit that the Court of Appeals correctly disposed of this case on the authority of its decision in *Hargett* v. *Summerfield*, and that further review is not warranted.[3]

1. In *Hargett* v. *Summerfield*, *supra*, the Court of Appeals restated the familiar principle "that employee removal and discipline are almost entirely matters of executive discretion, and that judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation" (Pet. App. 8a). Despite the line of authority in support of this proposition—much of it involving the Veterans' Preference Act—petitioner contends that this principle conflicts with Section 14 of that Act, which provides for the removal of veterans only for "such cause as will promote the efficiency of the service" 5 U.S.C. 863. Petitioner was removed, however, on a charge which obviously meets the statutory test—failure to attend to his duties during office hours. His argument, therefore, amounts to nothing more than a complaint that the evidence does not support the charge; and that

[3] We respectfully refer the Court to our brief in opposition in *Hargett*, No. 945, Oct. Term, 1956, wherein the reasons for denying review are set forth in further detail.

the Court of Appeals should have reviewed that evidence. The "unbroken line of authority," to which the Court of Appeals referred in *Hargett* (Pet. App. 8a), demonstrates the lack of substance in petitioner's contention. See, e.g., *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Williams* v. *Cravens*, 210 F. 2d 874 (C.A.D.C.), certiorari denied, 348 U.S. 819; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A.D.C.), certiorari denied, 346 U.S. 937; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A.D.C.); *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A.D.C.), certiorari denied, 333 U.S. 832.[4]

Despite this clear authority to the contrary, petitioner argues that the Court of Appeals should have reviewed the merits of his dismissal under *Humphrey's Executor* v. *United States*, 295 U.S. 602. His argument seems to be that the terms of the Veterans' Preference Act, taken together with the act extending civil service status to postmasters (39 U.S.C. 31(a)), puts him in the same status as the Federal Trade Commissioner involved in the *Humphrey* case. This argument is extremely difficult to follow. First, the *Humphrey* decision does not apply to postmasters, but to officials occupying quasi-judicial or quasi-legislative offices. Indeed, this Court in *Humphrey* expressly distinguished postmasters from such officials. 295 U.S. 602, 627. Second, the *Humphrey* case was not concerned with review of the evidence in support of a dismissal, but with the power of the President to remove a quasi-

[4] *Knotts* v. *United States*, 121 F. Supp. 630 (C. Cls.), cited by petitioner as conflicting with the foregoing, in fact restates this principle with approval. The validity of its further holding that the Court of Claims may review evidence of malice alleged to infect a discharge need not be considered here, since it does not conflict with the Court of Appeals' ruling on this record.

judicial official for causes other than those designated by Congress. Here, on the other hand, petitioner was removed from office for causes obviously within the applicable statute, and the merits of this removal have been thoroughly reviewed by the Civil Service Commission—the agency designated by Congress to supervise such dismissals. The *Humphrey* case has no application to dismissals effected through regular civil service channels.

2. Petitioner contends that his dismissal could not be effected by an Assistant Postmaster General because he was appointed by the President, with the consent of the Senate, and there can be no presumption that an Assistant Postmaster General acts for the President. However, it is well established that the President acts through the heads of departments in the executive branch. See, *e.g.*, *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *United States* v. *Farden*, 99 U.S. 10, 15; *Cearly* v. *Weeks*, 259 U.S. 336; *French* v. *Weeks*, 259 U.S. 326. Here, he acted through the Postmaster General.

The acts of Assistant Postmasters General "are the acts of the Postmaster General when confined within the scope of the duties assigned to them by their chief." *United States* v. *Warfield*, 170 Fed. 43, 45 (C.A. 4); to the same effect see *M'Collum* v. *United States*, 17 C. Cls. 92, 101-102. By Section 1 (b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, the Postmaster General was authorized to "delegate to any officer, employee, or agency of the Post Office Department designated by him such of his functions as he deems appropriate"; referring specifically to this statutory provision, the Postmaster General, by Order No. 55064, 18 F.R. 8458, authorized the Assistant Postmaster Gen-

eral, Bureau of Post Office Operations, "* * * to take final action in his own name with respect to all transactions relating to personnel of the field postal service * * *." Section 823.1b of the Postal Manual states that this Assistant Postmaster General "[r]epresents and acts for the Postmaster General in the selection, appointment and discipline of postmasters."[5]

3. Finally, petitioner contends that the Administrative Procedure Act entitles him to judicial review of the merits of his dismissal. But, as was pointed out in *Wettre* v. *Hague*, 74 F. Supp. 396, 400 (cited by petitioner at page 12 of his petition): "Such a review is expressly omitted from the scope of the Administrative Procedure Act in cases involving matters of government personnel." Section 10(e) of the Act, which authorizes review of the substantiality of evidence supporting agency action (5 U.S.C. 1009(e)), applies only to adjudicatory hearings required under Section 5, which excepts from its coverage "(2) the selection or tenure of an officer or employee of the United States * * *." 5 U.S.C. 1004. Further, the determination of the factors which constitute "such cause as will promote the efficiency of the service," (5 U.S.C. 863) is a matter "by law committed to agency discretion." 5 U.S.C. 1009.

[5] In this connection, it might be noted that the current Directory of Post Offices lists a total of 23,496 post offices of the first, second, and third classes, all requiring Presidential appointment of their postmaster. Without such delegation as shown above, efficient administration of the Post Office Department would be impossible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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